EQUITY: ENFORCEMENT OF NEGATIVE COVENANTS.—In *Andersan v. Neal Institutes Company et al*[1] the defendant company operating through the United States gave plaintiff the exclusive right for 99 years in Northern California to advertise, receive and use in business, its remedies and treatment for the excessive use of alcohol and drugs. The plaintiff built up a large business in San Francisco, then the defendant company ceased to supply him with its remedies and in conjunction with the other defendants maintained a rival institute in San Francisco. The case is clearly one where damages are inadequate, yet specific relief will not be granted. It thus resembles the case of the opera singer and baseball player, although the grounds are not entirely the same. The interest of personal liberty and the practical impossibility of compelling satisfactory service prevents specific performance in the opera singer and baseball player cases. These grounds are not present in the principal case, but there is a real difficulty of supervising performance. The result is that a person building up a business which is dependent on a contract with another for continuous work and performance must take a chance on having that business destroyed by a breach of contract, with damages the only compensation for the destruction. The rule is so well established that the plaintiff in the principal case made no attempt to get specific performance, but did try to bring indirect coercion on the defendants by preventing them from maintaining the rival business in San Francisco.[2] This procedure was sanctioned in the leading case of Lumley v. Wagner,[3] and that decision has ever since been the subject of heated controversy. Where Lumley v. Wagner is followed[4] the doctrine is usually qualified by two

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It is not necessarily anything more than a prima facie recognition, leaving the matter still open to controversy. . . . . Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials; it is an instrument of great capacity in the hands of a competent judge; and is not nearly as much used, in the region of practice and evidence, as it should be." Thayer, A Preliminary Treatise on Evidence, p. 308. It should be noted that § 2102 of the Code of Civil Procedure is not necessarily a bar to this administrative function. If the matter is properly one for judicial notice the judge should declare it to the jury and the jury must follow the judge's instructions. When the judge takes judicial notice of a fact as one of general notoriety his instructions should be conclusive in the absence of evidence in the record.

[1] (May 8, 1918), 26 Cal. App. Dec. 931.

[2] Barry Gilbert, Enforcement of Negative Covenants, 4 California Law Review, 114, 127.

[3] (1852), 1 DeG. M. & G. 604, 50 Eng. Ch. Rep. 466.

[4] See 8 Harvard Law Review, 172, quotations from Mr. Justice Holmes refusing to bow to the authority of Lumley v. Wagner. When the case came before the entire bench, it was distinguished from Lumley v. Wagner without expressly refusing to follow its authority. Rice v. D'Arville (1895), 162 Mass. 559, 39 N. E. 180.

requirements: (1) that the services should be of exceptional value and of a kind where a substitute could hardly be secured, as in the cases of the star opera singer or the star baseball player; (2) that the services enjoined are in competition with plaintiff and causing him damage the amount of which cannot be readily estimated.[5] The first requirement seems to be met in spirit by the principal case. It does not appear, however, whether the plaintiff had a business which was being carried on to a certain extent independently of his contract with defendant company and which would be injured by the competition. The controversy over Lumley v. Wagner seems however as pointed out by the court to have been settled in California by Subdivision 5 of section 3423 of the Civil Code which provides "an injunction cannot be granted: . . . . Fifth. To prevent the breach of a contract, the performance of which would not be specifically enforced." Perhaps for that reason the question has not been presented before. Even in jurisdictions where Lumley v. Wagner is not law relief by injunction is sometimes given under special circumstances. If in the principal case the only covenant were negative, the defendant company simply agreeing not to go into a rival business in San Francisco, it would of course be enforced without question if no illegality appeared. Suppose, however, there was no dispute over the affirmative covenant, the defendant company continuing to supply the plaintiff with its remedies, but also in breach of its contract supplying a rival house; or suppose that the consideration were apportioned three-quarters for supplying plaintiff and one-quarter for staying out of competition in San Francisco.[6] When some lawyer has drawn a contract with these provisions will the court hold that section 3423 of the Civil Code prevents an injunction?

A. M. K.

HUSBAND AND WIFE: ACTIONS FOR ENTICEMENT AND CRIMINAL CONVERSATION.—*Jameson v. Tully*[1] is interesting for wto reasons. First, because of the liberal construction by the court of section 4½, Article VI of the Constitution. There was plainly an erroneous admission of testimony in the trial of the action before a jury; furthermore the testimony was of such a kind as might possibly have affected the jury's verdict. There was, however, sufficient evidence aside from that improperly admitted to sustain the verdict. The Supreme Court disregarded the possible error.

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[5] Pomeroy, Specific Performance (2d ed.), p. 31. Barry Gilbert, Enforcement of Negative Covenants, 4 California Law Review, 114, 116.

[6] George Luther Clark, Implications of Lumley v. Wagner, 17 Columbia Law Review, 687, where a careful analysis of the cases, and references to the best discussions are given.

[1] (June 4, 1918), 55 Cal. Dec. 837.